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No. 1222

In the Supreme Court of the United States

OCTOBER TERM, 1969

MATT KOEHL and THE AMERICAN NAZI PARTY,

PETITIONERS

v.

STANLEY R. RESOR, Secretary of the Army, and MELVIN R. LAIRD, Secretary of Defense

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

ROBERT V. ZENER,
DONALD L. HOROWITZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the district court (Pet. App. 2a-9a) is reported at 296 F. Supp. 558. The order of the court of appeals (Pet. App. 1a), affirming on the opinion below, is reported at 417 F. 2d 1338.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1969. The petition for a writ of

certiorari was filed on February 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners have a constitutional right to display political symbols—Nazi flags and swastikas —as an adjunct to a funeral ceremony in a national cemetery.

STATEMENT

George Lincoln Rockwell, President of the American Nazi Party (also known as the National Socialist White People's Party), was assassinated on August 25, 1967. His remains were cremated, and petitioners Koehl and the Party are co-custodians of the ashes. This suit arises in connection with Rockwell's interment.

As an honorably discharged veteran, Rockwell was eligible for burial in any national cemetery except Arlington. A permit was accordingly issued by the Secretary of the Army for Rockwell's burial at Culpeper National Cemetery. It provided, however, that Nazi emblems and insignia were not to be displayed. (J.A. 14-15.)[1] The cortege arrived at Culpeper on August 29, 1967, accompanied by members of the funeral party in the attire of Nazi stormtroopers. They wore Nazi uniforms, including swastika arm bands. Nazi flags, banners and swastika-decorated

[1] "J.A." refers to the Joint Appendix in the court of appeals.

floral pieces were displayed. The Superintendent of the cemetery reiterated the Army's policy, provided the group with a copy of the applicable regulations, and requested that Nazi insignia be removed. After examining the regulations, petitioner Koehl stated that the group would not comply with the permit by removing the insignia. Rockwell was therefore not buried at that time. (J.A. 15-16.)

Subsequently, petitioners' counsel wrote the Secretary of the Army to request burial authorization, asserting that the Army had no right to restrict the "symbols that may be worn or shown or expressed in any manner on federal property" (Pet. App. 20a). The Secretary again indicated that a permit would be issued, but declined to authorize the use of insignia of the Nazi party (Pet. App. 23a-24a). The Secretary did, however, grant the request for graveside music and singing, as well as a eulogy by petitioner Koehl (Pet. App. 23a).

Petitioners thereafter brought this suit. Acting on a stipulation of facts, the district court dismissed the action on the ground that a national cemetery is so committed to other purposes that it would be inappropriate to permit political demonstrations there. The court also found "no evidence in this case supporting the plaintiff's charge of discrimination" (Pet. App. 7a). The court of appeals affirmed on the opinion of the district court (Pet. App. 1a).

ARGUMENT

The courts below correctly held that the government may properly deem national cemeteries to be inappropriate sites for political demonstrations. Of the entire spectrum of public places, the national cemeteries surely rank high among those places "so clearly committed to other purposes that their use for the airing of grievances is anomalous". *Adderley* v. *Florida*, 385 U.S. 39, 54 (dissenting opinion). See, also, *id.* at 41; *Cox* v. *Louisiana*, 379 U.S. 536, 555.

Unlike a public school, which is particularly committed to the free market in ideas, see *Tinker* v. *Des Moines School District*, 393 U.S. 503, or a public street, which is essential to assembly and communication among citizens, see *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (opinion of Mr. Justice Roberts), a national cemetery is peculiarly a place of repose and serenity. It is a dedicated place, visited by mourners and relatives of the servicemen who rest there. For some it is also hallowed ground, a place of worship as well as bereavement. As custodian of the cemetery, the Secretary has the responsibility, not merely to prevent breaches of the peace as petitioners contend (Pet. App. 20a-21a), but to protect the sensibilities of mourners and worshippers and the tranquility and dignity of the national burial grounds against intrusion by the type of demonstration planned here.

We stress that the Secretary's action to preserve the character of the burial ground leaves all other channels of communication open. Cf. *United States*

v. *O'Brien*, 391 U.S. 367, 388-389 (concurring opinion). The public streets, the national parks, meeting halls—none is affected by the Secretary's action. In addition, the eulogy to be delivered by petitioner Koehl may be utilized for the expression of whatever views he may deem appropriate in connection with the burial. The Secretary's regulation does not prevent Rockwell's remains from being interred in the cemetery and goes only so far as is necessary to maintain the national cemetery's serenity and dignity.

Petitioners' claim of unconstitutional discrimination is without merit. The regulations permit patriotic organizations to "conduct services purely memorial in purpose" in national cemeteries. Department of the Army Technical Manual 10-287 ¶ 205a (Pet. App. 13a). The record shows that no group other than the Nazis has attempted to bring the symbols of any political party into a national cemetery (J.A. 17, ¶ 14). While the symbols of veterans' organizations have been permitted, that distinction rationally reflects the purposes of the national cemeteries.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ROBERT V. ZENER,
DONALD L. HOROWITZ,
Attorneys.

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